CropLife ☆AMERICA☆

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Executive V.P., General Counsel/Secretary

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Stephen L. Johnson
Administrator
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Ronald J. Tenpas
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Re: Stipulated Settlement Agreement in *NW Coalition for Alternatives to Pesticides, et al., v. NMFS*, No. 07-1791-RSL (W.D. Wash. July 30, 2008)

Dear Administrators Balsiger and Johnson and Assistant Attorney General Tenpas:

I am writing to express the concerns of CropLife America with the adoption and implementation of the recent Settlement Agreement in *NW Coalition for Alternatives to Pesticides, et al., v. NMFS*, No. 07-1791-RSL (W.D. Wash.) ("*NCAP*"). A copy of the Settlement Agreement is attached for your reference.

The National Marine Fisheries Service ("NMFS") stipulated to the settlement on July 30, 2008, and the court endorsed it two days later, on August 1. In the settlement, NMFS agreed to follow a schedule for completing consultations under § 7(a)(2) of the Endangered Species Act ("ESA") on the alleged effects of 37 pesticides on salmon and steelhead species listed as "endangered" or "threatened" species under the ESA. The pesticides are registered by the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Until NMFS completes those consultations, uses of these pesticides in the Pacific Northwest remain subject to injunctive restrictions imposed by the court over four years ago in *Washington Toxics Coalition v. EPA*, No. 01-0132C (W.D. Wash. Jan. 22, 2004).

CropLife America is the nation's largest trade organization for pest management in agriculture and other areas. We represent more than 80 developers, manufacturers, formulators and distributors of virtually all the crop protection products used by American farmers and growers. Our members manufacture, and hold EPA registrations for, the pesticides at issue in the *NCAP* and *Washington Toxics* cases. Thus, in a very real sense, CropLife's members are the major stakeholders in the outcomes of the consultations NMFS finally has agreed to complete.

Section 7 of the ESA, NMFS's implementing regulations (50 C.F.R. Part 402, issued jointly with the U.S. Fish and Wildlife Service ("FWS")), and the joint NMFS-FWS Endangered Species Consultation Handbook (March 1998) all provide a significant role for any "permit or license applicant" – in this case, the pesticide registrant(s) – in the consultation process under ESA § 7(a)(2). The main purpose of this letter is to obtain the assurances of NMFS and EPA that, as NMFS carries out the consultations with EPA under the *NCAP* Settlement Agreement, the registrants of the pesticides are accorded the full voice in the process that they are given under the statute, regulations, and Handbook.

Some of the key elements from CLA's perspective concerning participation by pesticide registrants in any ESA § 7(a)(2) consultation on EPA-approved registrations of their products include:

- Consultation must be concluded within 90 days following its initiation by EPA, unless the registrant is given notice (for an extension up to 60 days) or the registrant consents (for an extension beyond 60 days) – ESA § 7(b)(1)-(2); 50 C.F.R. § 402.14(e); Handbook § 4.4(A);

- EPA "shall provide" the registrant "with the opportunity to submit information [to NMFS] for consideration during the consultation" – 50 C.F.R. § 402.14(d), (f); Handbook p. 2-13; and

- During the initial 90-day formal consultation period, NMFS should meet or communicate with EPA and the registrant to gather any additional information necessary to conduct the consultation; NMFS should undertake these actions "cooperatively" with EPA and the registrant to "develop a better understanding of direct and indirect effects of a proposed action" – 50 C.F.R. § 402.14(g)(5); Handbook § 4.4(a) at p. 4-6.

Chapter 2 (p. 2-13) of the Handbook delineates the registrant's role in detail. In addition to the points already mentioned, it requires that:

- The registrant is entitled to review draft biological opinions it obtains through EPA, and to provide comments to NMFS through EPA (*see also* 50 C.F.R. § 402.14(g)(5));

- NMFS must consider the registrant's comments when they are officially submitted by EPA (*see also* 50 C.F.R. § 402.14(g)(5));

- NMFS will discuss the basis of its biological determination in the draft biological opinion with the registrant and seek the registrant's expertise in identifying reasonable and prudent alternatives to the action if likely jeopardy or adverse modification of critical habitat is determined; and

- NMFS will provide the registrant with a copy of the final biological opinion.

One critical feature of the consultation process is its safeguards for the protection of *draft* biological opinions. The Handbook (p. 1-12) gives the registrant a right to obtain the draft and provide comments through EPA, subject to the caveat that, once the draft is released to the registrant, it may no longer be considered an interagency memorandum exempt from public disclosure under the Freedom of Information Act. Similarly, the regulations enable EPA to review a draft biological opinion "for the purpose of analyzing the reasonable and prudent alternatives" and allow the registrant to submit comments. 50 C.F.R. § 402.14(g)(5); *see also* Handbook p. 4-6. Outside of those circumstances, however, the Handbook unambiguously forbids public disclosure of the draft: "Do not release or distribute the draft biological opinion." Handbook p. 4-7.

Nothing in NMFS's stipulated commitments in the *NCAP* Settlement Agreement preempts NMFS and EPA from honoring these standard procedures. On the contrary, ¶ 1 of the Settlement Agreement expressly commits NMFS to comply with its consultation regulations, and ¶ 13 expressly preserves "the discretion accorded the agencies by law with respect to the procedures to be followed in completing the actions set forth above or the substance of any biological opinion." Thus, CLA requests assurance from both NMFS and EPA that any consultations the agencies conduct under auspices of the *NCAP* Settlement Agreement will adhere to the process and safeguards outlined above and to all other elements of the Services' regulations and Handbook.

CLA finds it necessary to seek this assurance now because some of the predicate language of the Settlement Agreement and the process NMFS has followed so far for consultations on the first three pesticides in the schedule (referred to in the Settlement Agreement as the "Initial Organophosphates") deviate significantly from the letter and the spirit of the regulations and Handbook. Setting aside NMFS's failure to conclude the consultations within 90 days of when EPA initiated them years ago (which was one basis for the *NCAP* lawsuit), and recognizing that the individual registrants of the Initial Organophosphates may raise these and other points if they are given a voice in the consultations as they are entitled, CropLife notes the following examples of discrepancies, anomalies, and departures from announced practices:

- **Problem.** Despite the Services' clear policy against disclosing draft biological opinions ("Do not release or distribute the draft biological opinion"), the

Settlement Agreement (p. 3) recites as one predicate that "NMFS understands that it is generally EPA's intention to make public the draft biological opinions it receives from NMFS regarding pesticide actions under [FIFRA]," and NMFS agrees (*Id.* p. 3 ¶ 2) to provide the public with a draft biological opinion on the Initial Organophosphates by July 31, 2008. The presence of this remarkable language in NMFS's court settlement underscores why the contradicted portions of the Handbook dealing with release of draft documents should be required reading not only for the EPA and NMFS personnel involved in the consultations, but also for the Department of Justice lawyers who represent the agencies in court.

Requested Resolution. Seek the court's approval of modifications of the Settlement Agreement to: (1) strike the "Whereas" clause referring to public disclosure of draft biological opinions; (2) add language stating that, notwithstanding NMFS's commitment in ¶ 2, public disclosure of any remaining draft biological opinions will be subject to the purposes of, and limitations on, public disclosure of drafts set forth in the regulations and Handbook.

- **Problem.** Despite the Services' clear policy against disclosing draft biological opinions, NMFS released its draft Biological Opinion on the Initial Organophosphates (chlorpyrifos, malathion, and diazinon) to the world on or about July 31, 2008, including posting the full 377-page document on NMFS's web site (http://www.nmfs.noaa.gov/pr/pdfs/pesticide_biological_opinion_draft.pdf), without first disclosing it to the registrants and affording them their right to review the draft and submit comments.

  Requested Resolution. As to the draft Biological Opinion on the Initial Organophosphates, immediately commence discussions with the registrants and EPA concerning the basis for NMFS's proposed conclusions and the availability of reasonable and prudent alternatives. *See* 50 C.F.R. § 402.14(g)(5) ("Service responsibilities"). For subsequent consultations, seek input from registrants on draft biological opinions, and take account of registrants' input, before the biological opinions are released in any form to the public.

- **Problem.** It is further indicative of this problem that EPA's policies negate the particular and special role that the registrant is expected to have in ESA consultation under the regulations and Handbook. EPA has posted the draft Biological Opinion on its web site under a cover memorandum (http://www.epa.gov/espp/litstatus/effects/nmfs-opin-draft.pdf) stating that EPA plans to post all draft biological opinions it receives from NMFS under the *NCAP* Settlement Agreement on its website. The only legal justification

EPA gives for this continued departure from the Handbook is a Federal Register notice describing EPA's "Endangered Species Protection Program Field Implementation" (70 Fed. Reg. 66392, 66401 (Nov. 2, 2005)). That document, however, does not address a registrant's right to review and comment on a draft biological opinion. Rather, it speaks only of obtaining input on a draft biological opinion from state, tribal, and local governments, not of providing the draft to the public at large. As there are no EPA regulations or guidance documents on point and EPA's field implementation guidelines do not require disclosure to the general public, EPA should defer to the Handbook.

Requested Resolution. Modify EPA's practices and the corresponding portions of the cover memorandum so that they comport with the purposes for, and constraints on, distribution of draft biological opinions as set forth in the Services' regulations and Handbook.

- **Problem.** The public release of the draft Biological Opinion not only violates the registrants' rights to review and comment, but makes a mockery of the stated regulatory purpose of providing the draft to EPA as the action agency – i.e., "for the purpose of analyzing the reasonable and prudent alternatives." 50 C.F.R. § 402.14(g)(5). As you will see, the page in the draft Biological Opinion headed "Reasonable and Prudent Alternative" (p. 304) is completely blank. Even more than NMFS's extraordinary delay in preparing the draft Biological Opinion and certainly on a par with the gross errors in that document (see next bullets), this omission of text in the most critical part of any biological opinion with a jeopardy determination is inexcusable.

  Requested Resolution. Supplement the draft Biological Opinion by adding NMFS's proposed or recommended reasonable and prudent alternatives, or an explanation of why none are being provided at this stage. *See* 50 C.F.R. § 402.14(g)(5) ("Service responsibilities"). For subsequent consultations, include proposed or recommended reasonable and prudent alternatives (or an explanation of why none are being provided at this stage) in draft biological opinions.

- **Problem.** EPA has not provided the registrants with the opportunity to submit information for consideration during the consultation.

  Requested Resolution. EPA should provide registrants with the opportunity to submit information before a draft biological opinion is released to the public. 50 C.F.R. § 402.14(d), (f); Handbook p.2-13.

- **Problem.** NMFS did not meet or communicate with the registrants to gather any additional information necessary to conduct the consultations, much less

work "cooperatively" with the registrants to develop a better understanding of the effects of the registrations. This failure to allow registrants to submit information and to meet and communicate with registrants renders the draft Biological Opinion seriously flawed because, *inter alia*, it relies on obsolete and incomplete data, analyzes effects of cancelled uses and application practices that are no longer legal, and contains other very basic mistakes, all of which ensure its failure to use the "best scientific and commercial data available" as ESA § 7(a)(2) requires and render its conclusions, including its jeopardy conclusions, arbitrary.

Requested Resolution. NMFS should meet with, or solicit input from, registrants within the initial 90-day formal consultation period. Handbook p. 4-6.

- **Problem.** NMFS reached "jeopardy" conclusions in the draft Biological Opinion without discussing the basis of its biological determination with the registrant and without seeking the registrant's expertise in identifying reasonable and prudent alternatives.

  Requested Resolution. As to the draft Biological Opinion, NMFS should immediately commence discussion with the registrants on these matters. For subsequent consultations, discuss these matters with the registrants before releasing draft biological opinions to the public. Handbook p. 2-13.

CLA recognizes that NMFS may have viewed some of these departures from its established consultation practices, particularly as regards the draft Biological Opinion on the Initial Organophosphates, to have been driven by the exigencies of the *NCAP* litigation. This is not a sufficient basis for failing to limit distribution of the draft Biological Opinion and otherwise failing to comply with those procedures, however, especially in a stipulation that purports to commit the Service to conducting "the consultations pursuant to the regulations set forth in 50 C.F.R. 402.01-402.14" (Settlement Agreement ¶ 1). As to the three Initial Organophosphates, therefore, NMFS and EPA must immediately give the registrants adequate opportunity to submit data and comment meaningfully on the draft Biological Opinion and any proposed reasonable and prudent alternatives and otherwise work cooperatively with the registrants. If sufficient time does not remain between now and October 31, NMFS should return to the court and seek modification of the deadlines pursuant to ¶¶ 5 and 9 of the Settlement Agreement. Further, as to the remaining 34 pesticide covered by the Settlement Agreement, NMFS and EPA should commit to complying with the standard practices for consultations.

One final point bears mention concerning the process that was followed for stipulating to the settlement in the *NCAP* case. Stipulated settlements in all prior cases involving EPA's alleged duty to consult with NMFS or FWS concerning the possible effects of pesticide registrations on ESA-listed species have been contingent on giving the public an opportunity to

provide public comment on the proposed settlements through notice in the Federal Register. *See, e.g.*, 71 Fed. Reg. 52,073 (Sept. 1, 2006) (soliciting public comment on proposed stipulated injunction in *Center for Biological Diversity v. Johnson*, No. C 02-1580-JSW (N.D. Cal.)). Despite following that practice in four different lawsuits, the Federal Government did not provide any opportunity for public comment on the proposed settlement agreement in *NCAP*. CropLife is dismayed by the Government's failure to solicit public comment in this instance and instead to race ahead with a settlement that, besides being legally flawed, has serious implications beyond the narrow interests of the parties to the litigation. Whether or not it was legally required, providing an opportunity for public comment would have been sound public policy and may have obviated some of the concerns we raise in this letter.

Thank you for your attention to his matter. CropLife looks forward to your responses.

Sincerely,

Douglas T. Nelson